



November 21, 2014

*Via email and U.S. Mail*

Michelle Walker  
Regulatory Branch Chief  
U.S. Army Corps of Engineers  
PO Box 3755  
Seattle, WA 98124-3755

RE: Seattle District Corps' Definition of "High Tide Line"

Dear Ms. Walker:

We are writing on behalf of Sound Action, Friends of the San Juans, and Washington Environmental Council to express our concerns that the Seattle District of the U.S. Army Corps of Engineers has adopted an impermissible definition of the term "high tide line" for purposes of establishing its jurisdiction over navigable waters under the Clean Water Act ("CWA"). The result of this impermissible definition is that the Corps is failing to protect waters that deserve protection, leading to continued habitat degradation through shoreline armoring in Puget Sound. We would like to discuss a path towards remedying this problem.

It is well established that bulkheading and shoreline armoring around Puget Sound cause significant ecological degradation, both individually and cumulatively.<sup>1</sup> The problem of

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<sup>1</sup> For example, Puget Sound Partnership, a state agency tasked with coordinating the recovery of Puget Sound, uses armoring as one of its indicators of Puget Sound recovery due to the adverse effects of this practice. See, e.g., USGS, Puget Sound Shorelines and the Impacts of Armoring—Proceedings of a State of the Science Workshop, May 2009, Scientific Investigations Report 2010-5254 (Shipman, et al. eds., 2009), available at <http://pubs.usgs.gov/sir/2010/5254/pdf/sir20105254.pdf>; Puget Sound Vital Signs, *Shoreline Armoring, Is there progress? Indicators and Targets*, Puget Sound Partnership (February 26, 2014), available at [http://www.psp.wa.gov/vitalsigns/shoreline\\_armoring.php#](http://www.psp.wa.gov/vitalsigns/shoreline_armoring.php#)! ("Armoring directly alters geologic processes that build and maintain beaches and spits. Bulkheads also impact erosion patterns on nearby beaches, alter beach substrate and hydrology, and reduce the availability of large wood. These physical changes to beaches can diminish the availability and condition of key shoreline habitats. Armoring can also directly impact organisms and ecological processes by burying or displacing upper beach habitat and altering the natural transition between terrestrial and aquatic ecosystems. Impacts of armoring differ from one coastal setting

shoreline armoring will likely become even more severe in the face of global sea level rise. However, the U.S. Army Corps of Engineers, charged with protecting our waterways under the Clean Water Act ("CWA")—and whose activities are further regulated by the Endangered Species Act ("ESA")—does not currently exercise jurisdiction over the vast majority of armoring activities in Puget Sound. The Corps' failure to do so is based on an incorrect interpretation of its governing authorities, and this failure needs to be remedied.

Under § 404 of the CWA, 33 U.S.C. § 1344, it is unlawful to discharge, "dredge or fill" materials in navigable waters without a permit from the U.S. Army Corps of Engineers. "Navigable waters," in turn, is defined to mean "the waters of the United States, including the territorial seas." *Id.* § 1362 (definitions). The Corps has defined "waters of the United States" for purposes of its authorities via regulation. In relevant part, those regulations affirm that its jurisdiction extends to the limit of the "high tide line," 33 C.F.R. § 328.4, which is defined as follows:

The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. **The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.**

*Id.* § 328.3(d) (emphasis added).<sup>2</sup>

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to another, but have been demonstrated both on Puget Sound and elsewhere to impact habitat for fish, birds, and invertebrates."); *see also* WDFW, Protecting Nearshore Habitat and Functions in Puget Sound (revised 2010), *available at*

<http://wdfw.wa.gov/publications/00047/wdfw00047.pdf>; Department of Ecology, *Healthy shorelines equal a healthy Puget Sound*, February 2010, *available at*

<https://fortress.wa.gov/ecy/publications/publications/1006004.pdf>; Department of Ecology, *Marine Shoreline Armoring and Puget Sound*, February 2010, *available at* <https://fortress.wa.gov/ecy/publications/publications/1006003.pdf>.

<sup>2</sup> Note that CWA jurisdiction is considerably more expansive than jurisdiction under the Rivers and Harbors Act, which only "extends to the line on the shore reached by the plane of the mean (average) high water." 33 C.F.R. § 329.12(a); *see also Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754 (9th Cir. 1978) ("The district court's holding that the Corps' regulatory jurisdiction under the FWPCA is 'coterminous' with that under the Rivers and Harbors Act... is faulty... it is clear from the legislative history of the FWPCA that... Congress intended to expand the narrow definition of the term 'navigable waters...'").

After the CWA was adopted in 1972, the Corps initially adopted a much narrower definition of its jurisdiction, essentially conflating its River and Harbors Act and CWA jurisdictional reach and limiting it to the traditional test for navigability. That regulatory definition was struck down in *Natural Resources Defense Council v. Callaway*, 292 F. Supp. 685 (D.D.C. 1975). Additionally, several courts in enforcement cases found that discharges into waters above the mean high water mark were meant to be covered by the CWA. For example, in *U.S. v. Holland*, the court found that the mean high water line was not a limit to federal authority under the CWA. 373 F. Supp. 665, 676 (M.D. Fla. 1974) ("Pollutants have been introduced into the waters of the United States without a permit and the mean high water mark cannot be used to create a barrier behind which such activities can be excused.").

In response, the Corps adopted new regulations changing the limit of its CWA jurisdiction to include the high tide line, as defined above. 42 Fed. Reg. 37122 (July 19, 1977). In so doing, the Corps recognized that:

[m]any aquatic areas along the coast are located above the mean or mean higher high tide lines but do not fit within the definition of "wetlands" discussed above. These include sandflats, mudflats, and similar areas, that, while not covered with vegetation, are inundated with sufficient frequency and regularity to be included as part of the aquatic resource... The term [high tide line] is intended to include areas covered by spring high tides and other high tides that occur with periodic frequency, but does not include those areas that are covered by tidal water as a result of storm surges, hurricanes, or other intense storms.

*Id.* at 37129. The current definition of high tide, initially adopted in 1986, was not meaningfully changed from the 1977 definition.

A number of cases have applied these definitions to find unlawful discharge activities that occurred between the highest tide line and other markers like mean high water. For example, in *U.S. v. Malibu Beach*, 711 F. Supp. 1301 (D.N.J. 1989), ruling on a motion for a preliminary injunction, the Court ruled that the government was likely to succeed on its claim that defendants violated the CWA by filling in an area of dunes that could be inundated at high spring tide. The Court explicitly observed that the high spring tide was 1.6 feet higher than the mean high tide. In *U.S. v. Boccanfuso*, 882 F. 2d 666 (2<sup>nd</sup> Cir. 1989), the Court addressed a situation where fill activities took place above mean high water (the limit of RHA jurisdiction) but below "extreme high tide" (the limit of CWA jurisdiction). The Court found that even though a staff person had told the defendant no permit was necessary, the Corps would not be estopped from pursuing an enforcement action regarding defendant's failure to obtain a permit for activities in this zone.

The Seattle District Corps does not apply the regulatory definition of high tide line in its implementation of its CWA obligations in Puget Sound. Instead, it has adopted as its definition of "high tide line" the "mean higher high water" mark. *See, e.g.*, Seattle District, Online Permit Guidebook ("Under Section 404 of the Clean Water Act, the extent of Corps jurisdiction in tidal waters extends to the high tide line. Currently, the Seattle District uses the mean higher high water mark as the geographic limits of the high tide line."). The guidebook further defines mean higher high water ("MHHW") as "the average higher high tide at a benchmark over a period of 20 years."<sup>3</sup>

The difference between "true" high tide and MHHW in Puget Sound is significant. For example, the National Marine Fisheries Service ("NMFS") uses extreme high tide in defining salmonid critical habitat. *See* Endangered and Threatened Species; Designation of Critical Habitat for 12 Evolutionarily Significant Units of West Coast Salmon and Steelhead in Washington, Oregon, and Idaho, 70 Fed. Reg. 52,630-01, 52,664 (September 2, 2005). The difference between extreme high tide and MHHW is thought to be significant; several feet in many places in Puget Sound. At a gentle shoreline gradient, this represents potentially hundreds of feet of shoreline that should be subject to Corps regulations but are not. It is well recognized that the Corps issues very few permits for shoreline armoring activities that are nonetheless regulated (albeit ineffectively) by the state.

There appears to be little consistency among the West Coast Corps districts in how they approach this jurisdictional question. We have obtained some documents on this subject pursuant to a Freedom of Information Act request. For example, a May 17, 2013, internal Corps memo notes that the Alaska district uses "extreme high tide"; the Los Angeles districts use individual on-site determinations; the Sacramento district uses mean high water; and the Seattle and Portland districts use MHHW. Memorandum to Seattle District Corps (May 17, 2013). The correspondence underlying this memo recognizes that there is little justification for this inconsistency and recommends elevating the issue for regional or even national resolution. *See, e.g.*, Email from Karen Kochenbach, Alaska Regulatory Chief, to Michelle Walker, Seattle Regulatory Chief (May 2, 2013) ("MHW is not mentioned in our regulations or law. Since [high tide line] and HAT seem to be two different terms for the same elevation, Seattle could/should use HAT/HTL for Section 404 jurisdiction."). Despite efforts to resolve the inconsistencies and apply a more uniform and defensible approach to regulating shoreline armoring activities, nothing appears to have been done to date, nor does it appear that those efforts are continuing.

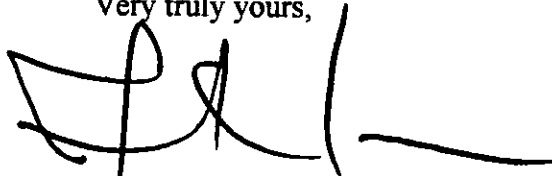
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<sup>3</sup> On the west coast, there are typically two high tides in a diurnal tidal cycle. Accordingly, MHHW refers to the mean of the higher of the two high tide cycles.

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Use of the MWWH mark to limit jurisdiction is inconsistent with the CWA and its implementing regulations, and this narrow approach to jurisdiction is causing the kind of harm that Congress sought to prevent in enacting the CWA. We believe that it would be useful to schedule a meeting to discuss our concerns and evaluate potential solutions. Please call one of us at (206) 343-7340 to discuss scheduling. Thank you for your consideration of this important issue.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Jan Hasselman', with a long horizontal line extending to the right.

Jan Hasselman  
Anna Sewell